Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

SALLIE ELIZABETH JONSTON-TAYLOR, Individually and as Administratrix of the Estate of EDWARD TAYLOR; DAVID ARGANIAN, LILLIAN ARGANIAN, Individually,

Petitioners

vs.

PHILIP J. GANNON, Individually and as President of LANSING COMMUNITY COLLEGE; BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, Jointly and Severally,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Joseph A. Warren
1016 N. Washington
Lansing, MI 48906
(517) 372-2444
Attorney For Petitioners

Charles Noble
2631 Telegraph Rd
P.O. Box 697
Flat Rock, MI

36 pp

QUESTIONS PRESENTED

I.

Does the Constitution require courts to strictly scrutinize claims of racial preferences used to terminate tenured public faculty?

II.

Does the Constitution require pre-or post-termination notice of the use of a racial preference in the selection of tenured public faculty for termination?

III.

Does Federal Rule of Civil Procedure 56 authorize a trial court to determine credibility on a motion for summary judgment?

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Petitioners, **Sallie Elizabeth Johnston-Taylor, individually and as Administratrix of the Estate of Edward Taylor, David Arganian, and Lillian Arganian**, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinions of the Court of Appeals are reported as *Johnston-Taylor v. Gannon*, 907 F.2d 1577 (6th Cir. 1990), and is reproduced at pages 11-23a of Appendix **I**, and the unpublished second opinion of *Johnston-Taylor v. Gannon*, 91-2398 United States Court of Appeals for the Sixth Circuit, is reproduced at pages 2-10a of Appendix **I**. The Sixth Circuit Court of Appeals Order denying Rehearing is published at page 1-a of Appendix **I**. The unpublished district court opinion granting summary judgment dated April 24, 1989 is reproduced on page 49-82a, Appendix **I** and the unpublished district court opinion, dated November 14, 1991 on remand from the Sixth Circuit is reproduced at pages 24-48a of Appendix **I**. The unpublished opinion of the district court denying Respondents Rule 12 (b) (6) motion is reproduced at pages 83-99a of Appendix **II**. The unpublished opinion of the Michigan circuit court is reproduced at page 100-117a of Appendix **II**.

JURISDICTION

The Sixth Circuit Court of Appeals Opinion in this matter was filed on September 2, 1992. A timely Petition for Rehearing was filed on September 16, 1992. The Court of Appeals' denial of the Petition for Rehearing was issued on October 20, 1992 and is set forth in Appendix I 1a. This Court's jurisdiction is invoked under Title 28, U.S.C. section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action is based upon the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> "No state shall...deny to any person within its jurisdiction the equal protection of the laws."

It is also based on the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, which provides in pertinent part:

> "No person shall be...deprived of life, liberty, or property, without the due process of law."

The principal statutory provision involved is 42 U.S.C sec. 1983 (1978), which provides in pertinent part that:

> [e]very person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State...causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall

be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

STATEMENT OF THE CASE

The United States District Court, Western District of Michigan, Southern Division, had jurisdiction pursuant to Title 18, U.S.C. section 3231 (a)(3)(4); 28 U.S.C 124 (1), 42 U.S.C. 1983.

A. Statement Of The Claim.

This case presents a constitutional challenge to the use of racial preferences, under the rubric of "affirmative action," during a reduction in force termination of tenured professors from a public college. It challenges the lack of any pre-termination notice of the use of race, and no hearing on the issue as a result. It challenges the Sixth Circuit's failure to apply a strict scrutiny analysis to the use of race in the termination of Petitioners' public employment.

B. Facts and Background.

In June 1967 Petitioner David Arganian was awarded an unrestricted grant of tenure prior to the college collective bargaining agreement taking effect. Under the collective bargaining agreement he possessed continuing contract tenure, as did Petitioner Taylor. At the time of their termination, Petitioner Arganian had 22 years seniority and Petitioner Taylor had 17 years. Taylor was also the faculty union president. The district court and Sixth Circuit found that

Petitioners had a property interest in their tenured faculty employment and were entitled to procedural and substantive due process.

The Alleged Financial Exigency: In March 1983 Respondent college contracted to purchase $500,000 of high tech equipment. The Board of Trustees scheduled a June 1983 millage to raise $610,000 to pay for the equipment. The millage failed. The administration requested the faculty and staff to take a 3% pay concession. The administration threatened to terminate staff if the employee unions refused to make the concession. The unions refused to reopen the contracts claiming that there was insufficient evidence of a financial crisis. The unions offered numerous cost savings proposals sufficient to pay for the equipment, but they were rejected by the administration because they were not pay concessions. College President Gannon then ordered the divisional deans to select people for termination.

Termination of Petitioners: On July 22, 1983 the Board of Trustees voted to terminate twenty-two faculty and staff, including Petitioners, effective forty five (45) days thereafter, on September 6, 1983. The terminations came at the beginning of the new fiscal year and were based upon an alleged "projected" revenue short fall of 1.1% of a 30 million dollar budget. No budget deficits existed in prior years.

Petitioners' termination letters stated only that they

had been selected for termination due to a financial exigency [Appendix II, 120a]. At no time prior to their termination did the college notify Petitioners that they had been selected for termination on the basis of racial preference, nor were they informed of that fact in any grievance meeting with any administrative official, nor at arbitration. Petitioners did not know how the dean had used race and affirmative action to select them for termination until five years later during discovery in this case.

The Monday following the Friday Board meeting to terminate faculty, Petitioner Arganian met with his department chairperson to find out why he had been selected for termination. The chairperson testified that he did not know the actual reasons, as he was not "privy" to the process, and therefore he could only "speculate" on the reasons for Arganian's selection. [Deposition of Anderson 35, 131-132]. Dr. Anderson never mentioned how race or affirmative action affected Petitioner Arganian.

Both Petitioners met with the personnel director to discuss when to turn in their keys and when their pay and benefits would end. At his meeting, Petitioner Arganian demanded to know how and why he had been selected for termination, as he was a high seniority faculty with an independent grant of tenure. The personnel director would not discuss his independent grant of tenure. He would only

discuss generally, but not get "specific," about the three categories used by Petitioner's dean to select the faculty in his division for termination [District Court Evidentiary Transcript 250-251]. The categories were: declining enrollment, full to part-time ratios, and a faculty member's student-administrative evaluations, which he chose from a list of "14 points" given to the dean [Appendix I 38a]. The personnel director never mentioned that the dean used a fourth category, which was race or affirmative action in making his selection of faculty to terminate.

Petitioners filed grievances alleging violations of the collective bargaining agreement and demanding their due process rights. On August 25, 1983 the college attorney met with the union attorney to discuss how the grievance process was to be implemented. Petitioners were not requested to attend, but did so.

The personnel director testified that Petitioner Arganian's attorney was barred from the meeting under the threat of removal by the campus police [Evidentiary Hearing Transcript 263-264, 414-415]. Again no written statement of the reasons, process, or data used by the dean to select Petitioners for termination was given to Petitioners at that meeting. No mention of the use of race or affirmative action ever came up at that or at any other grievance meeting with administrators. Petitioners had no notice, constructive or

otherwise, to know what role race played in their individual selection for termination.

Petitioners and their union representative requested the information and calculations used by the dean to rank them by their performance evaluations. The union attorney and labor representative demanded documents relied on by the college to establish a claim of financial exigency. Little, if any, of the requested financial data was provided prior to the effective date of Petitioners' terminations. The Petitioners' union filed an unfair labor practice charge in December 1983, complaining that the college refused to provide the union with the financial data. Five years later, during discovery in this case, Respondents belatedly provided some of the faculty rankings, but they have never released the dean's calculations of how he ranked the faculty.

Petitioners were not afforded any pre-termination or post-termination "hearing" before either their divisional dean, who had selected them for termination, or the Board of Trustees, who voted to terminate Petitioners on July 22, 1983. Respondent college admitted that it gave Petitioners no pre-termination due process hearings for Petitioner Arganian's unrestricted grant of tenure nor Petitioners' continuing contract tenure.

> "Defendants admit that Plaintiff Arganian has never been notified by any officer or agent of LCC that his tenure has been terminated nor has Arganian been

afforded a hearing on his tenure prior to his being terminated as a full-time professor." [Answer to Complaint, paragraph 22].

In its Answers to the First Set of Interrogatories the college further admitted:

> **INTERROGATORY: No. 59.** "Did Lansing Community College or any of its agents provide Plaintiff Arganian or Plaintiff decedent Edward Taylor with any form of a hearing prior to their layoff or termination? If yes, please provide a detailed statement as to the form of the hearing and/or any notice of such rights or hearing. If no, state the reasons why Plaintiffs' Arganian and decedent Taylor were not given a notice and a chance for a hearing prior to their lay off or termination."
>
> **RESPONSE:** "Neither the College nor its agents provided Plaintiff David Arganian or Edward Taylor a hearing prior to their layoff, **nor were they entitled to any such hearing prior to their layoff**." [Emphasis added] (Answers to First Set of Interrogatories R-128].

In September 1983, Petitioner Arganian filed suit in the Ingham County Circuit Court of Michigan and received a temporary restraining order to prevent his termination from taking effect. His suit was to compel the college to divulge how he was selected; the specific reasons and data used for his selection for termination; and to compel the college to hold a due process hearing; or in the alternative, award damages for violations of his constitutional rights of procedural and substantive due process. Respondents petitioned the court to dissolve the restraining order and filed a motion

for summary judgment. Respondents alleged Petitioner was not entitled to any due process under a reduction in force.

The state circuit court issued an order staying all of Petitioner Arganian's discovery requests, over the objections of Petitioner's attorney [Appendix **II** 118a]. Seven months later the court dismissed Petitioner's complaint without prejudice. The court ruled that Petitioner's constitutional pre-termination due process claims were not "ripe" until after the grievance procedure had run its course through arbitration. [Opinion of the court, Appendix **II** 105a].

Both Petitioners filed grievances under the collective bargaining agreement prior to their termination taking effect, but arbitration did not occur until over a year after their terminations. The arbitrator specifically ruled that he was not considering any of Petitioner's statutory or constitutional claims and limited his decision to the "four corners" of the collective bargaining agreement. Race was not an issue in the arbitration proceedings because Petitioners did not discover the extent race played a part in the selection process until November 1988. The arbitrator's decision was issued on December 19, 1984.

Affirmative Action And The Use Of Race To Terminate Petitioners:

The college's first statement that affirmative action had been a factor in Petitioner Arganian's termination was

in response to Petitioners' grievances, four months after the termination had taken effect. In answer to his grievance the college stated to Petitioner Arganian:

> "The person with the next highest performance evaluation within the Western Civilization Program does have less service, but is also a minority.
>
> For these reasons you were affected by the reduction in force plan. The Master Agreement was not violated in this process." [Portion of a Letter to David Arganian, November 23, 1983, from Ron Dove, personnel director, page 6, Defendants Exhibit P]

Enclosed with the letter was the "14 points" given to the deans of the college to review programs for possible termination of faculty and staff. [Appendix I 38a]. The "14 points" included the phrase "affirmative action," but no statement was ever produced by Respondents, or given to Petitioners, which defined what "affirmative action" meant, or how it was to be defined or applied to the selection of Petitioners for termination.

Petitioner Taylor committed suicide on February 5, 1986, "allegedly due to depression over his dismissal". [Appendix I 15a].

Petitioner Arganian and the estate of decedent Taylor filed suit in federal court alleging, among other things, that the college violated their procedural and substantive due process rights. During discovery, Petitioners learned that race had been used in their selection for termination. The

deposition testimony of Petitioner's dean revealed that minorities were exempt from termination. He testified that only the "affirmative action" phrase on the list of "14 points" was defined for him by the administration:

> "The only exception would be that it was clear, because of affirmative action, **blacks and other minorities would not be laid off**." (Emphasis added) [Deposition of Sam Kintzer, p. 33].

The other deans in the college reviewed programs and selected the lowest senior faculty members to terminate. Petitioners' dean rejected seniority, and used subjective student and administrative evaluations to select the faculty to terminate from those programs he recommended for staff reductions. Petitioners' dean selected three white males over the age of fifty to terminate. The Respondents have never divulged the numerical calculations used by the dean to rank faculty. The district court refused to rule on two motions by Petitioners to compel production of these numbers.

Among the allegedly lowest ranked faculty in the Humanities department, were Petitioner Arganian and a black colleague, Dr. Taperia Chiwocha, who had 12 years seniority, compared to Petitioner, who had 22 years of seniority. Petitioner had one of the highest seniority rankings in the college.

Petitioners' chairpersons met with Dean Kintzer before he made his selection of faculty to terminate. Petition-

er Arganian's chairperson, Dr. Joseph Anderson, testified that among the lowest ranked faculty by student and administrative evaluations, one was black and not therefore considered because of his race.

> "My understanding at the time is that one of the qualifications or one of the criteria was affirmative action and that, therefore, Dr. Chiwocha was not being considered or would not have been considered because of his race." [Deposition of Anderson, pp. 25-26].

Petitioner Taylor's chairperson testified that he told the dean that the factors he was using to select people for termination "pointed to others in the department more strongly than" Petitioner Taylor. [Deposition of Dr. William Heater, pp, 25, 165-166]. The dean testified that those recommendations were not acceptable because one would have been a "for cause" termination, and the other person was black and that person "would have been covered by the affirmative action issue." [Deposition of Kintzer p. 46].

The personnel director also testified as to the use of race in the selection process.

> "Well, if we had a particular department where there was just one minority, we probably wouldn't lay that one minority off in consideration of all the other criteria that was being considered. That would be a consideration in line with the 14 criteria." [Deposition of Dove p. 86].

The personnel director also testified that President Gannon approved Dean Kintzer's "methodology and approach." [Deposition of Dove, p. 49].

Petitioner Taylor's department had several minority faculty, one of whom the chairperson had recommended for termination because that person fit the dean's selection factors. The dean specifically rejected that person because of race and affirmative action [Deposition of Kintzer p. 46].

Respondent's own affirmative action plan specifically rejects the use of race in staff reductions. It states, in part, that:

> "All other personnel actions, including but not limited to compensation, **staff reductions**, promotion, social and recreational programs, will be administered without regard to religion, **race, color,** national origin, age, sex, height, weight, marital status, handicap unrelated to job or position, or any other category protected by law." [Emphasis added, p. 4].

The labor agreement is silent on the use of race during a reduction in force. The only mention of affirmative action in the selection for termination was in the undefined and unranked "14 point" list given to the deans. Aside from the testimony of the dean and personnel director, which came five years after their terminations, Petitioners have never been given an oral or written statement as to how race and affirmative action was applied to select them for termination.

Respondents' affirmative action plan is not the result of any judicial or administrative finding of past discrimination. It contains no admission by the college of any past

discrimination. The college's own minority utilization study shows that there was no minority under utilization in Petitioners' division at the time of the terminations.

The Respondents have never articulated a reason why they had to categorize the faculty by race, exempt blacks and other minorities from termination, or apply "affirmative action" to an alleged economic reduction in force.

B. Decisions Below.

On April 13, 1987 the district court, ruling on Respondents Rule 12(b)(6) motion, ruled that Petitioners had stated a claim for violation of their procedural and substantive due process, and rejected Respondents' assertion that the grievance/arbitration process equaled due process, relying on *McDonald v. West Branch* 424 U.S. 284, (1984) [Appendix I 95a]. On April 24, 1989 the district court granted Respondents' motion for summary judgment. The district court awarded summary judgment to Respondents, holding that Petitioner Arganian's independent grant of tenure had merged into the labor agreement and that Petitioners had received due process under the terms of the grievance/arbitration procedure of the labor agreement [Appendix I 61a].

On appeal, the Sixth Circuit reversed the district court's grant of Respondents' motion of summary judgment. The Sixth Circuit stated that:

> "[t]he district court incorrectly determined that Arganian's tenure rights had coalesced into the rights of continuing contract. There is simply no legal foundation for this holding by the district court." [Appendix I 20a].

The Sixth Circuit specifically rejected the district court's holding "that the grievance procedure specified in the collective bargaining agreement satisfied due process," concluding that Petitioners were not afforded:

> "all the process due them... because they never had the opportunity to challenge grounds for their dismissal prior to their discharge...."[Appendix I 20a].

The Sixth Circuit also held that the:

> "professors did not receive a hearing on the existence of the financial exigency and were not informed of the criteria used to select them for discharge until the arbitration proceedings; the arbitrator never decided the issue of financial exigency. Thus, [they]...never had a sufficient opportunity to challenge the grounds for their dismissal, including the existence of the alleged financial exigency. [Appendix I 22a].

The Sixth Circuit remanded for an evidentiary hearing on "the validity of the procedural due process provided to them, [and] whether the criteria used by the dean had a rational basis," and "whether [an] exigency in fact existed." [Appendix I 20-21a]. The Sixth Circuit made no mention of the use of race in the selection criteria, even though Petitioners briefed the matter for the Sixth Circuit, and emphasized it at oral arguments.

After an evidentiary hearing on Respondents' motion

for summary judgement, the district court again granted Respondents summary judgment. The district court dismissed Petitioners' cross motion for summary judgment. Petitioners' cross motion for summary judgment was based upon Respondents admissions that no pre-termination due process hearing had been held and that Petitioners were terminated on an improper use of race and affirmative action. The district court did not address Petitioners' allegations of racial preference termination.

On the second appeal, the Sixth Circuit upheld the district court's grant of summary judgment, holding that Petitioners had received due process and that the factors used by the dean to select Petitioners for termination had a "rational basis." The Sixth Circuit did not analyze Petitioners' Equal Protection claim, and dismissed it as being "without merit." [Appendix I 10].

Petitioners request that this honorable Court review and reverse the opinion of the Sixth Circuit.

REASONS FOR GRANTING THE PETITION

The facts of this case give the Court an opportunity to reaffirm the constitutional principals enunciated in *Wygant v. Jackson Board of Education*, 476 US 267, 90 L Ed 2d 260, 106 S Ct 1842 (1986), in the context of the due process procedures required to ensure adequate pre-termination notice and hearing and post-termination due process to

challenge the use of race to terminate tenured public faculty.

I. THE SIXTH CIRCUIT'S FAILURE TO ADDRESS THE ISSUE OF RACIAL PREFERENCE IN PETITIONERS' TERMINATION FROM TENURED FACULTY PUBLIC EMPLOYMENT HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND HAS SANCTIONED SUCH A DEPARTURE BY A DISTRICT COURT, AS TO CALL FOR THE EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION TO REQUIRE THE APPLICATION OF STRICT SCRUTINY REVIEW TO THE USE OF RACIAL PREFERENCES UNDER THIS COURT'S DECISION IN *WYGANT, supra.*, AND *RICHMOND V. CROSSEN CO.*, 488 U.S. 469 (1989).

The Sixth Circuit's opinion of September 2, 1992 simply dismissed Petitioners' equal protection claim of a racial preference termination without any application on the record of the strict scrutiny analysis required by this Court in *Wygant, supra.* The Sixth Circuit's opinion merely stated: "Plaintiff's equal protection and free speech arguments are without merit." [Opinion p. 6, Appendix I 10a].

Petitioners' briefs and oral arguments before the Sixth Circuit outlined to the court the similarities of Petitioners' claim and the fact situation in *Wygant, supra.*[1] As in

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[1]. Counsel for Petitioners was an attorney before this Court on the *Wygant* case, and therefore is familiar with the unique facts and circumstances in both of these cases. Counsel informed the

Wygant, supra., higher seniority whites were laid off, and less senior minorities were retained. In this case, as in, *Wygant, supra.*, minorities were exempt from layoff under a claim of financial exigency. In this case, no court at any level has analyzed Petitioners' equal protection claim of unlawful racial preference terminations of publicly employed tenured faculty.

In *Wygant, supra.*, this Court restated its requirement that: "'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.'" at 274-5, citing *Fullilove v Klutznick* 448 US 448, 491, 65 L Ed 2d 902, 100 S Ct 2758 (1980). This Court required a two pronged examination: **1.)** Any racial classification "must be justified by a compelling governmental interest, (citing: *Palmore v Sidoti*, 466 U.S. 429, 432. 80 L Ed 2d 421, 104 S Ct 1879 (1984); see *Loving v. Virginia*, 388 U.S. 1, 11, 18 L Ed 2d 1010, 87 S Ct 1817 (1967); cf. *Graham v Richardson*, 403 U.S. 365, 375, 29 L Ed 2d 534, 91 S Ct 1848 (1971) (alienage); and **2.)** "the means chosen by the State to effectuate its purpose must be "narrowly tailored' to the achievement of that goal.'" (citing *Fullilove, supra.* at 480).

Sixth Circuit of this at oral argument to aid them in their analysis and application of the appropriate tests to the facts in this case.

The Sixth Circuit has simply ignored this requirement of strict scrutiny judicial review, or even the need for judicial inquiry when the issue of race has been raised. By failing to deal with the issue, the Sixth Circuit has sanctioned racial preference terminations of tenured public faculty, in the absence of any compelling government purpose.

Respondents have offered no reason, argument, or even alleged, a compelling governmental interest which would allow Respondents to categorize the faculty by race, exempt minorities from termination, and select Petitioners for termination on the basis of racial preferences. The deposition testimony shows that Petitioners were terminated under the rubric of "affirmative action," in the absence of any articulated and compelling need for remedial affirmative action.

In this case, the college clearly violated its own affirmative action plan. That plan requires that reductions in staff be "administered without regard to...race, [or] color...." Moreover, the College's Affirmative Action Plan's Utilization Analysis clearly showed that minorities were not under utilized in Petitioners' division. The entire burden of whatever purpose Respondents had in using racial preference terminations is born entirely by the Petitioners.

Exempting minorities from layoff in the Petitioners' division was totally irrelevant to any legitimate public

purpose, and totally irrational. At no time in this case have Respondents identified any purpose to justify excluding minorities from termination. Therefore, there can be no finding that the purpose behind the racial preference, 'transcended' the harm to Petitioners.

Unlike *Wygant, supra.*, the Respondent's were not following any collective bargaining agreement provision, or Affirmative Action Plan, but merely excluded minorities from lay-off under the rubric of "affirmative action." Respondents have made no attempt to cloak their use of racial preference termination with any form of legitimacy.

Respondents "affirmative action" rubric was not based upon a finding of any past discrimination, nor has any agency competent to do so, found that Respondents discriminated in the past. The Colleges' Affirmative Action Plan contains no admission by the College of any past discrimination against minorities. Nor does it contain any findings that would justify any claim of remedial use of race to achieve a compelling governmental objective.

As in *Wygant, supra.*, Respondents have no evidentiary support to conclude that any remedial affirmative action was necessary. Respondents merely assert that the undefined statement "affirmative action" was on the list of "14 points" given to the deans, and that alone justified the dean's use of racial preference to terminate senior tenured faculty. This

constitutes an extreme and flagrant misuse of racial preferences under the rubric of "affirmative action."

A. Under *Wygant, supra.*, The Claim Of Financial Exigency Cannot Not Rise To The Level Of A Compelling Governmental Interest Sufficient To Justify The Use Of Racial Preferences To Terminate Tenured Public Faculty.

The failure of the Sixth Circuit to perform the required strict scrutiny analysis of Respondents' use of race seriously departs from this Court's requirement that courts do "a most searching examination" into the use of race, as in this case, to terminate tenured faculty employment. *Wygant, supra.*, at 273. The claim of an alleged financial exigency simply cannot rise to a compelling governmental interest sufficient to terminate tenured faculty on the basis of race, simply because it is irrelevant to the use of race.

This Court has placed the burden of proving a compelling governmental interest sufficient to classify people by race on the Respondents, *Wygant, supra.* at 274. Respondents have never attempted to meet this burden or even present a defense to this issue. The Sixth Circuit's failure to analyze this case by the standards articulated by this Court in *Wygant supra.* have relieved Respondents from the onerous burden of proving that their racial preference terminations are justified under the law.

The Sixth Circuit's refusal to deal with this issue

requires this Court's intervention to reaffirm the requirement that courts must apply strict scrutiny analysis to the use of racial preference terminations to protect innocent victims from misguided governmental use of race under the rubric of "affirmative action."

II. THE SIXTH CIRCUIT'S UPHOLDING OF THE LEVEL OF DUE PROCESS ACCORDED PETITIONERS SIGNIFICANTLY DEPARTS FROM MANY DECISIONS OF THIS COURT, INCLUDING, THIS COURT'S HOLDINGS IN *PERRY V. SINDERMANN*, 408 U.S. 593 (1972), *CLEVELAND BOARD OF ED. V. LOUDERMILL*, 470 U.S. 532 (1985), *MCDONALD V WEST BRANCH*, 466 U.S. 284 (1984) AND NEARLY ALL OTHER CIRCUITS.

A: This Court should rule, in support of Wygant, that the 14th Amendment requires that when race is a basis to select a tenured public employee for lay-off and/or termination, the employee is entitled to notice of how race was used in the selection, and an opportunity to respond to the process used.

Petitioners contend that inherent in the principles articulated by this Court in *Wygant, supra.*, there is the requirement that Petitioners be given adequate notice and a meaningful opportunity to challenge the use of racial preference terminations under affirmative action before being terminated from their tenured faculty positions. This Court has not addressed the standard of due process required to protect people terminated under an alleged application of

affirmative action in an economic layoff situations.

Petitioners claim they are entitled to pre-termination written notice of how race and affirmative action was used to select them for termination, and, at the very least, a meaningful hearing before the person using the racial criteria to terminate them, in order to challenge the application of race prior to being terminated.

Because of the odious nature of racial preference terminations, such notice must be in writing and articulate the specific purpose for which race is being used, and how the use of race was applied to select Petitioners for termination. This requirement ensures a record for later judicial review, if necessary, and protects Petitioners from disingenuous attempts by Respondents to claim later that notice was given in the absence of any documented proof of that fact. Respondents have simply never taken the use of race based terminations of tenured public faculty with the seriousness this Court intended in its *Wygant, supra.*, and *Croson, supra.* decisions.

The facts of this case present this Court an opportunity to define the standards of due process notice and hearing necessary to protect tenured public faculty from racial preference terminations under a claim of financial exigency. In *Wygant, supra.*, the racial preference termination formula was part of the collective bargaining agreement and all

teachers had access to the district wide seniority list so that each teacher knew exactly how they would be affected by the race based lay-off language of the contract.

Petitioners had no pre-termination knowledge that their terminations were affected by the application of race and affirmative action. "Affirmative action" was merely listed on the "14 points", as an undefined category. None of the administrators Petitioners met with ever mentioned that it had been applied to them, or that it was being used to achieve some compelling governmental interest. There was simply no notice how it was used to terminate Petitioners until **after** all of the alleged due process "hearings" had been held.

The Sixth Circuit, in upholding the district courts finding that Petitioners had been afforded all the process due them, said:

> "On November 23, **following the hearings**, Arganian and Taylor received a detailed written explanation for their layoffs." (Emphasis added) [Appendix I 5a].

Nearly three months after his termination, Petitioner Arganian first learned that the dean had applied affirmative action to his selection when Respondents answered Petitioners grievances. Respondents' answers to Petitioners' grievances were the first written statements supplied to Petitioners offering some explanation of how they had been terminated. The November 23, 1983 letter was only a limited

response to the specific allegations contained in Petitioners grievances. Even then, Petitioner Arganian had no specific knowledge as to how the dean used affirmative action.

At the time, Petitioner was trying to schedule depositions to find out why he had been terminated. Respondents obtained a court order staying all discovery [Appendix **II** 118-119]. At that point, Respondents had effectively denied Petitioner pre-termination notice of the use of race in his selection and had blocked access to all post-termination forums to challenge the use of race in his selection, including judicial review, as the circuit court had Respondents motion for summary judgement under review for the next seven months.[Appendix **II** 100a].

The arbitration hearing was held over a year after Petitioners' termination. The arbitrator specifically stated that he was not ruling on any of Petitioners' constitutional and statutory claims. He also refused to consider Petitioner's independent grant of tenure, on the objection of Respondents.

It was not until Petitioners filed their 42 U.S.C. 1983 action against Respondents did they learn the extent race and "affirmative action" had played in their terminations.

Petitioners contend that it would not be an intrusive due process requirement for this Court to extend the principles of *Wygant, supra.,* to require employers who use race or affirmative action in the termination of public employment

to state in writing with specificity: 1.), the compelling governmental interest that racial preference is being used to further; 2.), how racial factors, or affirmative action, was being used to achieve that purpose; and 3.), how race or affirmative action is being applied specifically to the persons affected. This would afford Petitioners with specific written notice of the use of race or affirmative action, and facilitate judicial review of allegations of unlawful use of race in termination situations, especially during economic reductions in force.

The district court noted that the Sixth Circuit has not provided any guidance on the due process standards required for the termination of tenured faculty under a claim of financial exigency. [Appendix I 31a]. The district court adopted the *Loudermill, supra.*, standard and stated that Petitioners were entitled to even "less due process than Loudermill received." [Appendix I 33a].

The district court based its reliance on *Loudermill, supra.*, on the mistaken belief that Petitioners had available post-termination due process through arbitration and judicial review [Appendix I 33-34]. The district court failed to disclose in its analysis of Petitioner's due process rights that the court itself had foreclosed discovery of Petitioners equal protection claim by court order, and thereby foreclosed any judicial review of the use of race in any earlier forum or

judicial proceeding.[2] Many years of litigation could have been avoided by a simple and basic due process notice requirement for an employer seeking to use race in the termination of tenured faculty.

The Sixth Circuit did not adopt the *Loudermill, supra.*, standard, nor did it adopt the standard outlined in *Whitsel v. Southeast Local School District,* 484 F.2d 1222 (6th Cir. 1973), which the Sixth Circuit cited to reverse the district court's first grant of Respondents' motion for summary judgment. The Sixth Circuit did not apply any balancing test as required in *Loudermill, supra.*, in determining what pre-termination due process Petitioners are entitled to.

Petitioners did not get any post-termination due process at all. This Court has ruled that an arbitration proceeding under Michigan law, does not satisfy due process, or take the place of judicial proceedings under 42 U.S.C. 1983. *McDonald v West Branch, Mich.* 466 U.S. 284, 104 S Ct. 1799, 80 L. Ed 2d 302 (1984).

The vast majority of the Circuits, in cases of alleged

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[2]. Petitioner Arganian introduced into evidence at the evidentiary hearing of March 1991 one hundred and seventy six pages of documents from Petitioners suit in the Michigan circuit court to prove that he had attempted to compel the college to divulge the reasons and data Respondents were using to terminate him, and to remind the court that it had barred all discovery during the period he might have had any meaningful post-termination due process hearings.

financial exigency, have held that the employer has the burden to show that the financial exigency was demonstrably bona fide; and that tenured faculty are entitled to have uniform and objective standards used to select faculty for lay off; to pretermination written notice of the reasons used to select and the employer's evidence; to time to prepare a defense, and a to meaningful opportunity to present their side of the story. *Johnson v Board of Regents*, 510 F2d 975 (7th Cir. 1975), *Krotkoff v Goucher College*, 585 F2d 675 (4th Cir. 1978); *Bignal v North Idaho College*, 538 F2d 243 (9th Cir 1976); *Texas Faculty Ass'n v University of Texas at Dallas*, 946 F2d 379 (5th Cir 1991).

There is absolutely no court in this country that has condoned or approved of the termination of tenured faculty when the alleged deficit is only 1.1% of a projected resource budget of over $30 million.

Petitioners' rights to notice of the use of race and the underlying data used by the dean to select them for termination is especially important in this case. This is especially critical where objective standards, such as seniority, are ignored if favor of subjective student and administrative evaluations. Respondents are, in effect, using an alleged claim of financial exigency to rid the college of faculty they cannot terminate under the more rigorous standards of a 'for cause' termination.

III. FEDERAL RULE OF CIVIL PROCEDURE 56 DOES NOT AUTHORIZE THE TRIAL COURT TO DETERMINE CREDIBILITY.

Petitioners have not waived jury trial. However, the district court did not hesitate in ruling that Petitioner Arganian's testimony that personnel director Dove could not give him the real reasons he was terminated because his attorney was present, was not credible.

This Court set forth the standard for granting a motion for summary judgment in a civil rights case in *Adickes v Kress & Co.*, 398 U.S 144, 26 L.Ed 2d 142, 90 S Ct 1598 (1970). In *Adickes, supra.*, This Court reaffirmed that the moving party under Rule 56, continues to carry the burden to prove the absence of a material fact in order to be entitled to summary judgment, even if no opposing evidentiary matter is presented.". *Adickes, supra.*, 398 U.S. at 159. Adickes alleged a conspiracy to violate civil rights under 42 U.S.C 1985. This Court ruled that the moving parties affidavits were insufficient because "of its failure to foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service,..." *Adicks, supra.*, 398 U.S. 157. This Court has made it abundantly clear that credibility is for the jury. In *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed 2d 202, 106 S.Ct. 2505 (1986), this Court stated:

"It by no means authorizes trial on affidavits. Credibility

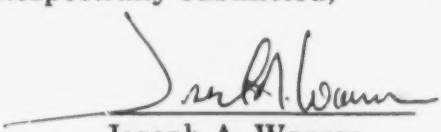
> determinations, the weighing of legitimate inferences from the facts are jury functions, not those of a judge...the evidence of the non-movant **is to be believed**, and all justifiable inferences are to be drawn in his favor." *Anderson, supra.,* p.254 (emphasis added)

Defendants, on the eve of the evidentiary hearing in March 1991, amended their Answer to Interrogatory 59, which had admitted that Respondents had not given Petitioners any due process hearings because they were not entitled to one. They now claim that they accorded Petitioners hearings. Petitioners respectfully submit that they are entitled to have a jury determine when respondents when Respondents were telling the truth.

CONCLUSION

The decision below squarely conflicts with decisions of other circuits as well as those of this Court. The issues herein are of vital concern, both to the nation as a whole as well as individual victims of discrimination, including the Petitioners. For these reasons, Petitioners respectfully urge this Court to grant the Petition.

Respectfully submitted,



Joseph A. Warren
1016 N. Washington
Lansing, MI 48906
(517) 372-2444
Attorney for Petitioners